SUPREME COURT, U. S.

No. 787

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners, The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, ("the Tribes") respectfully petition the Court to grant a writ of certiorari to the United States Court of Claims to review its order and decision with respect to the so-called Paragraphs 8 and 9 claims in Docket 50233, which involve the accidental designation of some 10,000 acres of the Tribes' land as national forest lands.

OPINIONS BELOW

An opinion of the Court of Claims, determining that certain boundaries of the Tribes' Reservation were erroneously surveyed, was delivered November 12, 1965, and is reported at 173 Ct.Cl. 398, reprinted at Appendix A below; this opinion is merely background for the purposes

of this petition. The order holding that the Tribes have lost title to the lands erroneously surveyed was entered by the Court of Claims on July 3, 1968, and is reprinted as footnote 3 in the opinion of that Court, Appendix B below. This petition seeks reversal of that order. The opinion of the Court of Claims explaining its order of July 3, 1968, was not issued until October 18, 1968; it is reprinted as Appendix B below, being as yet otherwise unreported.

JURISDICTION

The order sought to be reviewed was entered July 3, 1968. Time within which the petition for writ of certiorari might be filed was extended by Mr. Chief Justice Warren under date of September 30, 1968, to and including October 31, 1968, and again under date of October 24, 1968, to and including November 30, 1968. This Court has jurisdiction under Section 1 of the special jurisdictional act authorizing this suit, 60 Stat. 715 (1946), and 28 U.S.C. § 1255.

AUTHORITIES INVOLVED

Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, excerpts reprinted as Appendix C below.

Act of March 3, 1891, 26 Stat. 1095, 1099, 1103, excerpts reprinted as Appendix D below.

Presidential Proclamation of February 22, 1897, 29 Stat. 907, 908, excerpts reprinted as Appendix E below.

Act of June 4, 1897, 30 Stat. 11, 36, reprinted as Appendix F below.

Presidential Proclamation of November 6, 1906, 34 Stat. 3260, excerpts reprinted as Appendix G below.

Presidential Proclamation of March 2, 1907, 34 Stat. 3296, excerpts reprinted as Appendix H below.

QUESTION PRESENTED

Where (a) the Executive Branch accidentally designated treaty Indian reservation lands for inclusion in the national forest, thinking such lands to be vacant public lands because of an erroneous survey, and where (b) the Executive Branch acted pursuant to an act of Congress which authorized *only* vacant public land to be designated as part of the national forest, and where (c) the Executive Branch *disclaimed* any intent to so designate Indian lands, the question is whether the erroneous designation can be ratified and turned into a "taking" by the mere passive administration of these lands as part of the national forest, *without* any awareness of the error, contrary to *Creek Nation* v. *United States*, 295 U.S. 103 (1935) and *United States* v. *Goltra*, 312 U.S. 203 (1941).

STATEMENT OF THE CASE

Background

By the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, the Tribes ceded a vast area of land lying generally between the Continental Divide and the crest of the Bitter Root Mountains in the northwestern part of Montana, reserving, however, a portion for their exclusive use and benefit. Included within the lands reserved are the lands involved in this case. However, by a government survey of the northern boundary of this Reservation conducted in 1887, a portion of the Reservation was accidentally left outside of the surveyed boundary, and by virtue of an erroneous government survey on the southwest corner of the Reservation conducted in 1893, a somewhat larger tract was accidentally left outside of the surveyed boundaries. Both of such excluded parcels included forest lands.

In 1891, 26 Stat. 1095, 1103, Congress authorized the President to set aside what were later to be known as national forests:

> "Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having *public land* bearing forests, in any part of the *public lands* wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof." (Emphasis added).

Sec. 10 of the same Act, 26 Stat. at 1099, quoted below at Appendix D, provided that nothing in the Act should modify any treaties made with Indian tribes for the disposal of their lands.

Pursuant to this statute, and believing he was dealing with vacant public lands, President Cleveland in 1897—

> ". . . reserved from entry or settlement and set apart as a Public Reservation all those certain tracts, pieces or parcels of land lying and being situate in the State of Montana . . . as follows . . . ." 29 Stat. 907.

The description of the lands included a fraction of the parcels mentioned above which had accidentally been left out of the Flathead Reservation by the erroneous surveys.

The proclamation was not intended to apply to any part of the Flathead Reservation; it recited that "whereas, the *public lands* in the State of Montana . . . are in part covered with timber . . . ." 29 Stat. at 907, second paragraph (emphasis added), and because it expressly excepted all lands which were previously embraced "in any legal entry." 29 Stat. at 908, first full paragraph.

In 1897, Congress authorized the President to modify any executive order establishing any forest reserve. 30 Stat. 11, 36, Appendix F below. Pursuant to the statute, President Theodore Roosevelt in 1906 enlarged the Lolo Forest Reserve to include certain additional lands, and accidentally included in the description some of the Flathead Reservation which had been excluded from the Reservation by the erroneous survey. 34 Stat. 3260. Again

the proclamation was not intended to apply to the Flathead Reservation; it recited that it

> ". . . will not take effect upon any lands withdrawn or reserved, at this date, from settlement, entry, or other appropriation, for any purpose other than forest uses, or which may be covered by any prior valid claim, so long as the withdrawal, reservation, or claim exists."

Those parts of the erroneously surveyed parcels which were thus mistakenly included in the national forest, comprising 10,585.86 acres,[1] have ever since been administered as national forest lands. It is noted that the adjacent Flathead Indian Forest is also administered by the United States, the only difference being that the proceeds go to the Tribes instead of to the United States Treasury.[2] The record does not show whether any of the 10,585.65 acres were ever logged after the erroneous surveys.[3]

The Proceedings in This Case

In 1951, under a special jurisdictional act, 60 Stat. 715, the Tribes filed suit for a number of claims, including a claim for just compensation for the loss of lands excluded

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[1] The erroneous surveys left about 15,000 acres outside of the Reservation. About 5,000 of these acres were patented to homesteaders or granted to railroads, and it is conceded that the Tribes have lost title to these lands. *Creek Nation* v. *United States*, 295 U.S. 103 (1935).

[2] The Tribes' forest lands are held by the United States in trust, so the Tribes, if successful in this suit, would not be free to sell any part of them without the permission of the United States. Nor could the Tribes cut over the timber at will, because the forest is required by statute to be managed on a "sustained yield" basis. 25 U.S.C. § 466.

[3] The Court of Claims stated (App. p. 2b below) that the present claim is based partly on the Tribes' belief that they would gain more from an accounting for the past income of the land than from an award of damages for taking. We are unaware of any significant income from this land that would justify the Court's statement of our motives.

from the Reservation by the erroneous surveys (these are the so-called Paragraph 8 and 9 claims in Docket 50233, and comprise the instant case).

In 1965, the Court of Claims agreed with the Tribes that the 1887 and 1893 surveys had erroneously left parts of the Reservation outside the surveyed boundaries, and remanded the case to the trial commissioner for further proceedings. 173 Ct.Cl. 398, Appendix A below. At that time the court did not consider whether any of the erroneously surveyed parcels were still in tribal ownership.

In preparing for the next stage, which involved the identification of the lands, the acreage, the dates taken, and their values, it was ascertained that some of the lands had never left federal ownership, which indicated that they still belonged to the Tribes. The Tribes duly moved the Court of Claims to instruct the trial commissioner that some 10,585.86 acres still belonged to the Tribes and hence were not included in the Tribes' claim for compensation.

The Court of Claims, in an order dated July 3, 1968 (see Appendix B below, note 3) overruled the Tribes' contention, and held that the lands had been taken by the United States, and therefore were no longer owned by the Tribes. Later, on October 18, 1968, the Court handed down its opinion explaining its Order of July 3.

The rationale of the Court's holding that there was a "taking" by the United States was two-pronged. First, the Court said that such accidental inclusion of tribal lands in the national forest was turned into a taking because it was ratified by the Government. The Court noted that in *Creek Nation* v. *United States*, 295 U.S. 103 (1935), an erroneous survey had left some land outside the Creek reservation, and this excluded land was later patented to settlers on the assumption that the Creeks no longer owned it. The United States when it found out about the error failed to sue to cancel the

patents and retained the proceeds of the sales, which *Creek* said ratified the disposals. The Court of Claims noted that the Flathead parcels which had been mistakenly surveyed, had been administered as part of the national forest for many years and had been so treated by Congress and the Executive Branch, and as in the *Creek* case, this constituted ratification of the initial accidental designation of the lands as national forest lands. The court did not comment on the fact that in this case, unlike *Creek*, neither Congress nor the Executive Branch had any knowledge of the purported inclusion of the Flathead lands into the national forest until the Court of Claims so found in 1965.

Secondly, the court reasoned that the authorizing statutes of 1891 and 1897 could be interpreted to permit the President to put the land in question into the national forest, thus severing it from the Tribes, if in good faith he considered the land to be vacant public land, notwithstanding that in fact it may have been actively owned by an Indian tribe pursuant to a treaty. The court did not discuss the express language of the 1891 Act and the two proclamations, which made clear that it was never intended to place any part of an Indian reservation into the national forest.

REASONS FOR GRANTING THE WRIT

1. The Decision Conflicts With the Decisions of this Court in the Creek and Goltra cases

In *Creek Nation* v. *United States*, 295 U.S. 103 (1935), this Court held that an erroneous survey does not without more create a taking of Indian lands:

> "That survey [Darling's erroneous survey] did not effect any change in the existing ownership; nor was it intended to do so." 295 U.S. at 111.

Nor does the entry by a homesteader create the taking, but rather, it is the issuance of the patent, followed by the United States declining to cancel the patent and re-

taining the proceeds of the sales *after the error is discovered*, that elevates the issuance of the patent into a taking. 295 U.S. at 110-111.

The decision of the Court of Claims below conflicts with the *Creek* rule, by holding that the mere unwitting failure of Congress or the Executive Branch to rectify an error, which caused tribal land to be thought to be federal land, and the mere subsequent administration of this land as part of the national forest, elevates the error into a permanent severance of title, even though at no time was Congress or the Executive Branch aware of the error.

Furthermore, the decision below conflicts with *United States* v. *Goltra*, 312 U.S. 203 (1941). In that case, the Government wrongfully repossessed a fleet of boats leased from the United States, retained possession and reaped the benefits from the use of the boats. This Court held that mere possession and use of the boats by the United States did not constitute ratification or confirmation of the wrongful repossession and therefore, the transaction was a mere tortious act on the part of the Executive Branch, for which the owner was not entitled to just compensation. 312 U.S. at 210, 211. But in our case the Court of Claims says the mere passive administration of the forest lands by the Executive Branch, and silence on the part of an unaware Congress, constituted ratification of the taking. Clearly this is inconsistent with the *Goltra* concept as well as the *Creek* concept, as well as any notion of fair dealing with the Indians.

2. The Decision Conflicts With Other Decisions of the Court of Claims

In *Yakima Tribe* v. *United States*, 158 Ct.Cl. 672 (1962), the Yakimas owned a treaty reservation much like the Flatheads do. And like the Flatheads, the Yakimas were victims of several erroneous surveys which left parcels outside the reservation, designated as Tracts A, B,

C and D. The decision of the court relating to 425.32 acres of Tract C is relevant to the instant claim. This acreage was composed entirely of what would be vacant public land if the survey were correct. The Government had always treated this parcel as vacant public land, and since it was not suitable for settlement or forest, had never conveyed it to settlers or redesignated it as national forest or some other category of federal lands.

The Indian Claims Commission held that the Yakimas were not entitled to be compensated for this land, because the land was still owned by the Tribe.

The Court of Claims affirmed, stating (158 Ct.Cl. at 698):

> "Since the land has not been disposed of or set apart by the Government (through patenting it to settlers or otherwise), appellant is not entitled to an award of just compensation. The erroneous drawing of the Reservation boundary so as to exclude these lands did not constitute a taking. *United States* v. *Creek Nation*, 295 U.S. 103, 111 (1935)."

It is incongruous that the Court of Claims relied on the *Creek* case as authority for antithetical decisions involving such similar factual patterns. The United States treated the Yakima parcel as federal land (in the category of vacant public lands) just as much as it treated the Flathead parcel as federal land (in the category of national forest), and in our case it is held that this constituted a taking, while in *Yakima* it did not.

The decision of the Court of Claims below conflicts even more sharply with its own decision in *Seminole Nation* v. *United States*, 102 Ct. Cl. 565, 616-622 (1944), cert. den. 326 U.S. 719. In that case, 11,550.54 acres of the Seminole reservation were included in the Pottawatomie Reservation as the result of an erroneous survey conducted in 1872, and by an agreement ratified by Congress in 1891, 26 Stat. 989, 1016, the Pottawatomies

ceded their reservation, which erroneously included the above-mentioned Seminole land, to the United States. Then in 1892 a portion of the erroneously surveyed Seminole land was alloted to Pottawatomie Indians and between 1895 and 1913 the rest was patented to settlers. Although the error in the survey was later established, the United States took no action to cancel the patents and retained the benefits.

The *Seminole* case is almost identical to the *Creek* case, and, in fact, in rejecting the Government's argument that the 1891 Pottawatomie cession was the date of taking and holding the dates of patent to be the dates of taking, as this Court did in *Creek*, the Court stated:

> "Furthermore, Congress' adoption of the erroneous survey in both cases [instant case and *Creek* case] was done in ignorance of the fact that they were erroneous. *Their adoption in such circumstances could not be a taking, because the intention to take was lacking.* In this case, as in the *Creek* case, there was not a taking until the patents were issued and until the failure of Congress to direct their cancellation *after it was discovered* that they were issued on lands belonging to the Seminoles." 102 Ct. Cl. at 619-20. (Emphasis added).

The holding of the Court of Claims in *Seminole*, based on a principle derived from *Creek*, simply cannot be reconciled with the same court's holding in the instant case, where the court found ratification despite Congress' unawareness of what it was supposedly ratifying. Consequently the element of intent, absolutely necessary to effect a taking, is lacking.

3. The Confusion in the Law Will Recur Until this Court Resolves the Conflict

As a result of the decision below, the law has been rendered confused and unclear.

The question will recur in the future. For instance, in *Yakima Tribe* v. *United States*, 16 Ind.Cl.Comm. 536 (1966), on remand from the Court of Claims, 158 Ct.Cl. 672 (1962), the Commission found that an erroneous survey had been conducted by the United States resulting in the exclusion of approximately 120,000 acres of land from the Yakima Reservation designated as Tract D (referred to above). Approximately 21,088.66 acres of Tract D were designated as national forest lands under authority of the Act of June 4, 1897, 30 Stat. 11, 36, by Presidential Proclamation of March 2, 1907, 34 Stat. 3296. This is the same Act which authorized President Theodore Roosevelt to expand the Lolo National Forest but into which he erroneously included the Flathead Tribes' land, and the Yakima Proclamation contains language almost identical to the Flathead Proclamation, manifesting no intention to include Indian lands in the national forest. The Yakima claim relating to this tract is to be severed from all other claims in the case and embodied in a separate petition seeking restoration of the land to the Indians. See Final Judgment entered November 14, 1968, Docket No. 47, Indian Claims Commission.

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A

First Opinion Below

Note: For the opinion of which review is actually sought, see Appendix B below.

IN THE UNITED STATES COURT OF CLAIMS

No. 50233

(Decided November 12, 1965)

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, and COLLINS, *Judges*, and JONES, *Senior Judge*.

OPINION

COLLINS, *Judge*, delivered the opinion of the court:

Plaintiff, an Indian tribal organization formed under the Indian Reorganization Act,[1] is the successor in interest of a confederation known as the Flathead Nation. This suit arises out of a treaty which the Flathead Nation concluded with the United States in 1855.[2] The treaty was ratified on March 8, 1859,[3] and, pursuant to

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[1] 48 Stat. 984 (1934), as amended, 25 U.S.C. §§ 461-79 (1964).

[2] The present action involves two of the several claims of plaintiff which are founded upon a special jurisdictional act, the Act of July 30, 1946, ch. 701, 60 Stat. 715.

[3] Treaty with the Flathead, Kootenay [*sic*], and Upper Pend d'Oreilles Indians, signed July 16, 1855, 12 Stat. 975 (proclaimed April 18, 1859). The treaty was concluded at Hell Gate in the Bitter Root Valley.

it, a vast amount of land was ceded to the United States by the Flathead Nation. In addition, the treaty provided for the establishment of an Indian reservation.[4] The primary issue in this action is whether certain of the reservation boundaries, as surveyed by the United States, are in accord with the requirements of the treaty. Specifically, we must consider plaintiff's assertion that the existing boundaries on the north and on the southwest of the reservation are incorrect.

THE NORTHERN BOUNDARY

The portion of the treaty which describes the northern boundary is as follows: "* * * to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to [a designated divide] * * *." This boundary was surveyed in 1887 by United States Deputy Surveyor Edmund Harrison. Harrison determined the north-south midpoint of Flathead Lake, and the boundary line was extended from this point to the east and to the west. According to plaintiff, the existing north boundary is located too far south. Plaintiff claims that, because of this error, more than 4,200 acres of land and water were excluded from the reservation. In a report filed on August 7, 1964, Trial Commissioner Richard Arens concluded that plaintiff had failed to establish by a preponderance of creditable evidence that:

> * * * the location of the northern boundary of the Flathead Reservation, as it was laid out by Mr. Harrison in 1887, was not "to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake" as such extremities existed in 1887, and was not within acceptable limits of error.

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[4] A complete description of the boundaries of the reservation is set forth in finding 3(b), *infra*. The area ceded by the Flathead Nation is presently within the States of Montana and Idaho.

Thus, with regard to the northern boundary, our trial commissioner accepted the position put forth by defendant. We are unable to agree with the conclusion reached by the trial commissioner.

One matter in controversy is the proper location of the northern and southern extremities of Flathead Lake. With regard to chronology, plaintiff correctly observes that Harrison should have endeavored to ascertain the position of the extremities as of 1859, the year the Treaty of Hell Gate was ratified.[5] Plaintiff contends that the "best evidence" of the location of the 1859 end points consisted of certain meander lines.[6] For the northern extremity, plaintiff used a meander line reflected on an 1872 survey; for the southern extremity of the lake, a meander line from a 1905 survey was utilized.[7]

Defendant's experts, on the other hand, dispute the validity of the end points used by Morrison-Maierle, Inc., plaintiff's engineering experts. According to defendant, the major shortcomings of those end points are the facts that they relate to two different years and that neither pertains to 1859. Defendant points out that "the only evidence of the simultaneous location of the north and

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[5] For example, Article II of the treaty provided, in part, as follows:

"All which tract shall be set part, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. * * * And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. * * *" The quoted provision is a clear indication that the survey of the general reservation should have taken place in the year following March 8, 1859. The actual survey of the northern boundary did not occur until 1887, or 28 years later.

[6] For a definition of the term "meander line," see finding 5(b).

[7] Both the 1872 survey and the 1905 survey were performed by the United States General Land Office. Each dealt with a specific area in the vicinity of the reservation; however, neither was intended to be a survey of reservation boundaries as such.

south extremities of the lake is [Harrison's survey] * * * made in 1887."

We are of the opinion that, under the peculiar circumstances of this case, plaintiff is justified in using as the extremities of the lake the two meander lines in question. First, it is proper to utilize the meander line of 1872 as the northern extremity. The record indicates that, on the north side of Flathead Lake, the topography was such that the water level was subject to substantial fluctuation. Also, it can be assumed that the meander line itself changed over the decades. Nonetheless, we agree that the 1872 meander line is the "best evidence" of the 1859 extremity, because the 1872 survey was closer in time to the date of treaty ratification than was the Harrison survey or any of the other surveys considered.

Secondly, in view of the nature of the south end of Flathead Lake, use of the 1905 meander line is warranted. There, in contrast to the north end, the banks are quite steep, and the record indicates that the shoreline on the south has been stable. Thus, it appears that the 1905 meander line is, as plaintiff asserts, satisfactory evidence of the location in 1859 of the shoreline. Therefore, with respect to both extremities, we accept the views urged by plaintiff.

The conclusion of plaintiff's consulting engineers was that Harrison had placed the northern boundary 821.04 feet too far south on the west side of the lake and 1,231.89 feet too far south on the east side of the lake. Defendant's attack upon this conclusion is twofold. We have already rejected the first of defendant's arguments, *i.e.*, that regarding the invalidity of the end points used by plaintiff. The second argument of defendant is that any errors committed by Harrison were within acceptable limits of tolerance. This assertion must also be rejected.

A substantial part of the difference between Harrison's boundary line and that which plaintiff proposes can be attributed to a computational mistake on the part of Har-

rison. In utilizing his field notes to compute the location of the north end of the lake, Harrison made a mistake of 14.37 chains. The effect of this miscalculation was to place the center of the lake 7.18 chains (*i.e.*, one-half of 14.37) too far south.

Defendant argues that the discrepancy between (1) the figures shown on Harrison's field notes and (2) the distance he determined does not necessarily indicate that the northern boundary was misplaced. In answer to this argument, it is sufficient to refer to the fact that defendant's experts, Bernard F. Locraft, Civil Engineers, stated the following in their August 27, 1963, report: "Based on Harrison's survey notes we find that he made a 7.18 chain mistake in locating the north boundary line." Even though defendant's consulting engineers acknowledged the arithmetical mistake, their ultimate position was that Harrison's boundary was within reasonable tolerances. There is a basic fallacy in this position; *i.e.*, although tolerances are intended to allow for such matters as errors inherent in surveying instruments, it is improper to assert that arithmetical mistakes are likewise covered by tolerances.

Defendant's experts have admitted that Harrison's incorrect computation affected his determination of the midpoint of the lake. Since under no circumstances can this arithmetical mistake be excused on the ground of tolerances, it follows that there is no basis for applying tolerances to the existing boundary, a line which reflects the computational mistake.[8]

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[8] Since the fact of the computational mistake requires the rejection of Harrison's boundary, it is unnecessary to determine the degree of tolerance applicable to 1859 or 1887 surveys or to discuss the manner in which Harrison extended his line to the west. Also unnecessary is discussion of our decision in *Sioux Tribe of Indians* v. *United States*, 161 Ct. Cl. 413, 315 F. 2d 378, *cert. denied*, 375 U.S. 825 (1963). However, see *Warm Springs Tribe of Indians* v. *United States*, 95 Ct. Cl. 23, 39 (1941).

Defendant argues that:

> * * * The midpoint was not determined as of 1859 and cannot now be determined. This point was first determined in 1887 by Harrison. There is no way now that plaintiff can show that the midpoint of Flathead Lake was farther north in 1859 than that point was determined to be by Harrison in 1887.

For the reasons stated above, we have found that the argument of defendant is incorrect and that plaintiff's experts have succeeded in demonstrating where Harrison should have placed the midpoint. Accordingly, plaintiff is entitled to recover.[9]

THE SOUTHWESTERN BOUNDARY

The treaty description of the boundary on the southwest is as follows:

> * * * thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence notherly to, and along the divide bounding on the west the Flathead River * * *.

This boundary was surveyed in 1893 by Deputy Surveyor George Scheetz. Defendant concedes that the instructions which Scheetz had received from the Surveyor General of the United States were erroneous and that, as a result, approximately 11,900 acres of land and water were omitted from the reservation. However, plaintiff's claim is not limited to the 11,900 acres.

According to plaintiff, the treaty language regarding the southwestern boundary is ambiguous. Plaintiff asserts that the historical evidence presented by its experts re-

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[9] Using the extremities proposed by plaintiff, defendant's conculting engineers determined a boundary line that differed only slightly from that found by Morrison-Maierle, Inc. This difference can be resolved in the Rule 47(c) proceedings.

solves the ambiguity and demonstrates that a total of approximately 93,000 acres was excluded from the reservation. We cannot accept the argument of plaintiff.

It is significant that initially there was substantial agreement among the consulting engineers employed by plaintiff and those employed by defendant. In its November 20, 1961, report to plaintiff, Morrison-Maierle, Inc., stated the opinion that the survey of the southwestern boundary did not comply with the calls of the treaty and "that if compliance were had, no less than about 11,900 acres in addition would have been included." According to the report, the estimate of 11,900 acres was based upon a boundary which went to the *closest* point on Clarke's Fork (*i.e.*, the point nearest the confluence of the Flathead and the Bitter Root Rivers). Plaintiff's experts did state that "perhaps some lower * * * [point] could be sustained." Thus, the initial opinion of Morrison-Maierle, Inc., was not an unqualified one. Nonetheless, in the November 20, 1961, report, there was no real suggestion that the description of the southwestern boundary was "ambiguous." As stated above, defendant's consultants reached a conclusion substantially in accord with that first proposed by plaintiff's experts. This original agreement among the experts of the two litigants is not decisive of the question of interpretation of the treaty, but it is a persuasive indication (1) that the proper location of the boundary is ascertainable without undue difficulty and (2) that the extent of the omission was approximately 11,900 acres.

Moreover, plaintiff admits that the boundary which it now urges does not meet all the calls of the treaty. Plaintiff asks us to hold, on the basis of its historical evidence, that Horse Prairie and adjacent lands should have been included within the reservation. Under plaintiff's view, the boundary would go along the Clarke's Fork River to a point marking the *western* edge of Horse Prairie. Such a line would clearly fail to meet the requirement that the point on Clarke's Fork be "between the Camash and

Horse prairies," for Camash Prairie is located *east* of Horse Prairie.[10]

We are of the opinion that the proper boundary line is that accepted by defendant, *i.e.*, the line which goes to the nearest point on the Clarke's Fork River. It is correct, as plaintiff points out, that in going "to, and along the divide bounding on the west the Flathead River," this line does not go in a precisely "northerly" direction. Still, we agree with defendant that the description "northerly to, and along the divide * * *" is a general one, and that the boundary originally proposed by plaintiff's experts meets this general description as well as the other requirements of the treaty. In determining the boundary, it is imperative to consider all, not just some, of the calls of the treaty. When this is done, the description of the southwest boundary is sufficiently free of ambiguity.

In fact, although plaintiff refers to "resolving an ambiguity," it would appear that plaintiff is really seeking to have us set aside the wording of the treaty and substitute in its place a substantially different description. This we are unwilling to do. *Cf. Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 353 (1945). Our task in the present case is to construe the language of the treaty, not to rewrite it. Furthermore, the result would be the same even if we were to deem proper resort to plaintiff's historical evidence. Various of the documents gathered by Morrison-Mairele, Inc., do suggest that the

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[10] Plaintiff's brief refers to another alternative regarding the southwest boundary. This alternative line, which was proposed by one of plaintiff's witnesses, follows the Clarke's Fork River to an intermediate point, that is, a point located between (1) that accepted by defendant and (2) that in the vicinity of the western edge of Horse Prairie. Unlike the boundary which encompasses Horse Prairie, the intermediate line is not clearly contrary to the treaty description. On the other hand, the evidence in support of the intermediate boundary is not sufficient to warrant substituting it for the line described in the November 20, 1961, report of plaintiff's consulting engineers.

Upper Pend d'Oreilles, one of the tribes which participated in the treaty negotiations, did inhabit the area of Horse Prairie (or Horse Plains). However, plaintiff's evidence, including the map prepared by Hazard Stevens, is not adequate to prove that Horse Prairie was to be included within the reservation. Thus, whatever our view regarding ambiguity, plaintiff's claim with respect to Horse Prairie must fail.[11]

CONCLUSION

In conclusion, plaintiff is entitled to recovery consistent with this opinion, and the amount of plaintiff's judgment is to be determined pursuant to Rule 47(c). With regard to the northern boundary, we have accepted plaintiff's view as to the location of the midpoint of Flathead Lake, and plaintiff's recovery is to be based upon a boundary line which runs from that midpoint. Regarding the southwest boundary, the basis of recovery is to be the line proposed in the November 20, 1961, report of plaintiff's experts and accepted by defendant's experts.

The precise amount and the value of the acreage "taken" from plaintiff will be determined in the Rule 47(c) proceedings.

* * * *

[11] In support of the proposition that treaty ambiguities are to be construed in favor of the Indians, plaintiff cites the following cases: *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956); *Winters* v. *United States*, 207 U.S. 564, 576 (1908). The general principle urged by plaintiff is undoubtedly a sound one, but it is of no avail to plaintiff in this case. As stated above, plaintiff has failed to prove that either the boundary which would include Horse Prairie or the intermediate boundary line should be adopted.

APPENDIX B

SECOND OPINION BELOW

IN THE UNITED STATES COURT OF CLAIMS

No. 50233

(Decided October 18, 1968)

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA v. THE UNITED STATES

John W. Cragun, attorney of record, for plaintiff, *Wilkinson, Cragun & Barker*, and *Richard A. Baenen*, of counsel.

John D. Sullivan, with whom was *Assistant Attorney General Clyde O. Martz*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON PLAINTIFF'S MOTION FOR INSTRUCTIONS TO THE TRIAL COMMISSIONER

DAVIS, *Judge*, delivered the opinion of the court:

A claim which the Confederated Salish and Kootenai Tribes have pressed in this conglomerate suit (see, *e.g.*, 181 Ct. Cl. 739, 741) is that the Government erroneously surveyed the boundaries of the reservation carved out for plaintiff by the Treaty of Hell Gate, 12 Stat. 975 (signed on July 16, 1855, proclaimed on April 18, 1859).[1] In

[1] This claim is set forth in paragraphs 8 and 9 of the petition ("erroneous boundary surveys").

Confederated Salish and Kootenai Tribes v. *United States*, 173 Ct. Cl. 398 (1965), the court held that certain of the defendant's surveys were incorrect and that, as a result of these errors, a portion of plaintiff's territory had been taken by the defendant. The parties are now engaged in a proceeding, pursuant to Rule 47(c), to determine these lands and their value.

In this proceeding a dispute has arisen whether certain of these lands, some 10,585.86 acres since placed in national forests, are included in the claim. In the belief that it would gain more from an accounting for the past income of the land as well as the attributes of its present ownership, the claimant now asserts that these forest properties still belong to the tribes, have never been taken by the United States, and are therefore not a part of the present claim. The defendant demurs and insists that the claim encompasses these national forest tracts, as well as those lands patented to third parties or granted to railroads. To settle the matter, the plaintiff moved us to instruct the trial commissioner that the forest lands "remain the property of plaintiff and hence are not the property subject of this claim." The defendant disagreed.[2] We disposed of the motion by entering an order, on July 3, 1968, instructing the commissioner "that the lands erroneously excluded from the exterior boundary of plaintiff's reservation by reason of the faulty survey,

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[2] In addition to responding on the merits of the motion, the defendant argued that, under the special jurisdictional statute (Act of July 30, 1946, 60 Stat. 715), this court had no jurisdiction to decide whether the lands involved are the plaintiff's property. The contention is that Congress intended to confer jurisdiction to render money judgments only. But wholly apart from our power to grant formal declaratory relief under the special act (*cf. King* v. *United States*, 182 Ct. Cl. 631, 390 F. 2d 894 (Feb. 1968)), it is plain that we can decide any issue going to the amount of the recovery to which plaintiff is entitled. The present issue is precisely of that kind. If plaintiff prevailed in its view, its monetary recovery on this claim would be directly affected.

which lands are now in national forests, have not remained the property of plaintiff and therefore are property subject to the claim in suit and should be treated as such." Because the problem warranted a spelling out of our views, we added that "[a]n opinion of the court will follow in due course." [3] This is that opinion.

The northern boundary of the plaintiff's reservation was erroneously surveyed in 1887, the southwestern in 1893. See 173 Ct. Cl. at 400, 403. As a result, considerable land which actually belonged within the reservation was thereafter treated as part of the federal public domain. In February 1897 President Cleveland proclaimed as a national forest, under the authority of the Act of March 3, 1891, 26 Stat. 1095, an area including the part erroneously excluded by the incorrect northern boundary. In November 1906 President Theodore Roosevelt, under the Act of June 4, 1897, 30 Stat. 11, 36, placed within the pre-existing Lolo National Forest the portion of the Indian land excluded by the improper southwestern line. These lands have since been retained in the national forests. The Supreme Court has made it clear that, if the putting of such treaty-reservation tracts in national forests was authorized or ratified by Congress, the Federal

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[3] In full text, the court's order was as follows:

"This case comes before the court with reference to 'Paragraphs 8 and 9—Erroneous Boundary Surveys' on plaintiff's motion, filed March 1, 1968, for instructions to the commissioner on the issue of what lands are the proper subject of recovery in these suits. Upon consideration thereof, together with the response thereto, without oral argument, the trial commissioner is instructed that the lands erroneously excluded from the exterior boundary of plaintiff's reservation by reason of the faulty survey, which lands are now in national forests, have not remained the property of plaintiff and therefore are property subject to the claim in suit and should be treated as such. An opinion of the court will follow in due course.

IT IS SO ORDERED.

BY THE COURT

(sgd) Wilson Cowen
Chief Judge."

Government thereby took the Indians' property and they are entitled to compensation. *United States* v. *Creek Nation*, 295 U.S. 103, 110-11 (1935); *Chippewa Indians* v. *United States*, 305 U.S. 479, 481-83 (1939). See, also, *Tlinget and Haida Indians* v. *United States*, 182 Ct. Cl. 130, 389 F.2d 778, 781-82 (Jan. 1968); *id.*, 147 Ct. Cl. 315, 340-41, 177 F.Supp. 452, 467-68 (1959); *Uintah and White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1, 9, 152 F.Supp. 953, 958 (1957); *Ute Indians* v. *United States*, 45 Ct. Cl. 440, 461-62 (1910); *Pueblo de Zia* v. *United States*, 19 Ind. Cl. Comm. 56, 74 (1968).

The Tribes' point is, essentially, that the Presidents were never empowered by Congress to put these particular lands within the forest reserves, and therefore that these placements were, at least, no more than unauthorized torts which did not utilize the power of eminent domain or divest the Indians of their title and interest. *Cf. United States* v. *Goltra*, 312 U.S. 203, 208-09 (1941). Plaintiffs stress that, although the Act of March 3, 1891, *supra* (under which President Cleveland acted) authorized the President "from time to time" to "set apart and reserve" "public land bearing forests" as a forest reservation (section 24), the same statute also provided that "nothing in this Act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands * * * and the disposition of such lands shall continue in accordance with the provisions of such treaties or agrements * * *" (section 10). Similarly, the Roosevelt proclamation excepted "any lands withdrawn or reserved, at this date, from settlement, entry, or other appropriation * * * or which may be covered by any prior valid claim, so long as the withdrawal, reservation, or claim exists."[4] These provisions of stat-

[4] Proclamation of Nov. 6, 1906, 34 Stat. 3260. President Roosevelt acted under a statute (Act of June 4, 1897, *supra*) authorizing the President "at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve,

ute and proclamation, it is said, did not permit the inclusion of lands really belonging to the plaintiffs but wrongly thought by the Federal Government to be part of its non-Indian public land; the President, on this view, had no power at all to affect that type of property and it remained the Tribes'.

The answer, to us, is given by the principles underlying the Supreme Court's opinion in *Creek Nation, supra.* The Court pointed out that Creek lands had been erroneously given to other Indians and to settlers—on the incorrect assumption that the tracts did not belong to the Creeks—by officers of the United States and under patents "signed by the President." 295 U.S. at 110. The United States, the Court said, could have sued to cancel these improper disposals, but did not do so. "On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States in effect confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them." *Ibid.* The Court might have, but did not, construe the act providing for these allotments and disposals as withholding all authority to touch lands which were in fact Creek. Instead, the Court, though recognizing that the application of the statute to the Creek lands was "erroneous", treated this "erroneous application" as within the executive power under the statute, or, if not so initially, as thereafter ratified and confirmed by the Federal Government's allowing the disposals to stand. 295 U.S. at 111.

Here, the formal actions of Presidents Cleveland and Theodore Roosevelt have stood for many years; the areas

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and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve."

have been administered as, and have become part of, the national forests; they have been uniformly so treated by Congress and by the executive branch. If there was any original want of authority, in 1897 and 1906, to designate this land as an integral sector of the forest reserve, that lack has since been cured by the consistent legislative and executive treatment in the intervening years. There has, in other words, been legislative and executive confirmation and ratification, as there was held to be in *Creek Nation*. Such implicit recognition is fully effective. See, also, *United States* v. *Lynah*, 188 U.S. 445, 465-67 (1903); *United States* v. *North American Trans. & Trading Co.*, 253 U.S. 330, 333-34 (1920).[5]

Moreover, we decline to follow plaintiff in reading the two authorizing statutes pertinent to this case as withdrawing from the President any power to affect land which he mistakenly, though in good faith, considered to be non-Indian and public, and thus subject to being put aside for the forest reserve. Especially in view of the President's historically great powers over the public lands (*e.g.*, *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915); *Donnelly* v. *United States*, 228 U.S. 243, 256 (1913)),[6] it is preferable to interpret the legislation as giving effect to the President's good-faith actions until they are reversed, avoided, or cancelled by a direct at-

[5] In *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942), and *Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169 (1947), it was found, in very different circumstances, that Congress and the Executive, far from ratifying or confirming a taking, had made clear their intention not to recognize any compensable rights. In *United States* v. *Goltra*, *supra*, 312 U.S. 203, 209 (1941), the Court likewise found no "ratification or confirmation" of a taking, but rather the exact opposite. The unexpressed assumption of all three opinions is that there can be confirmation and ratification by a course of Congressional and executive conduct.

[6] In *Donnelly*, the Supreme Court said: "* * * from an early period Congress has customarily accorded to the Executive a large discretion about setting apart and reserving portions of the public domain in aid of particular public purposes."

tack. So long as they stand, they are not null and void. The language of the Acts permits this construction; the references to Indian lands and to tracts subject to other claims can easily be understood as establishing a substantive rule for the President's guidance, not as withholding from him all jurisdiction to act if it turned out that inadvertently or mistakenly he had included Indian areas in a federal forest reservation. In this case, for instance, the Presidents acted within their powers even though they were wrong in including the disputed strips in their proclamations. And because the Presidents were within their authority, their actions effected a taking of the plaintiffs' land. The Government would not be allowed to escape paying compensation for the property by arguing that the establishment of the forest reservations were mere unauthorized torts. By the same token, the Indians cannot now claim that the lands have always remained theirs.

These are the reasons for our order of July 3, 1968, instructing the trial commissioner "that the lands erroneously excluded from the exterior boundary of plaintiff's reservation by reason of the faulty survey, which lands are now in national forests, have not remained the property of plaintiff and therefore are property subject to the claim in suit and should be treated as such." We adhere to and reaffirm that order.

APPENDIX C

TREATY OF HELL GATE OF JULY 16, 1855

(12 Stat. 975)

* * * *

ARTICLE II. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification

of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied if with the permission of the owner or claimant.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. *And provided*, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

* * * *

APPENDIX D

ACT OF MARCH 3, 1891

(26 Stat. 1095, 1099, 1103)

* * * *

SEC. 10. That nothing in this Act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the Treasury of the United States; and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements, except as provided in section 5 of this act.

* * * *

SEC. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

APPENDIX E

PRESIDENTIAL PROCLAMATION OF FEBRUARY 22, 1897

(29 Stat. 907, 908)

* * * *

And whereas, the public lands in the State of Montana, within the limits hereinafter described, are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation;

* * * *

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired . . . ;

* * * *

APPENDIX F

ACT OF JUNE 4, 1897
(30 Stat. 11, 36)

* * * *

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.

* * * *

APPENDIX G

PRESIDENTIAL PROCLAMATION OF NOVEMBER 6, 1906

(34 Stat. 3260)

* * * *

This proclamation will not take effect upon any lands withdrawn or reserved, at this date, from settlement, entry, or other appropriation, for any purpose other than forest uses, or which may be covered by any prior valid claim, so long as the withdrawal, reservation, or claim exists.

* * * *

APPENDIX H

PRESIDENTIAL PROCLAMATION OF MARCH 2, 1907

(34 Stat. 3296)

* * * *

Excepting from the force and effect of this proclamation all lands which are at this date embraced in any legal entry or covered by any lawful filing or selection duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and also excepting all lands which at this date are embraced within any withdrawal or reservation for any use or purpose to which this reservation for forest uses is inconsistent . . . .

* * * *